

Tentative Rulings for Tuesday, November 22, 2016, for Department 9, Judge DeSantos presiding

Fullerton v Moren Case No. 16 C 0235

Defendant's motion to strike the allegations in paragraph 12 (alleging that defendants' actions were willful and oppressive) and paragraph 2 of the prayer seeking punitive damages is granted. The case authority cited by plaintiff in support of his punitive damage claim is distinguishable. (*Goshgarian v George* (1984) 161 Cal. App.3d 1214, 1224.) The defendant therein persisted in draining his stagnant swimming pool water on the plaintiff's property after being told not to do so by the sheriff and plaintiff, then he attempted to conceal his actions by burying the PCV pipe and placing encroachments on plaintiff's land, despite knowledge of the boundary marker and a recent survey. By contrast, in this case the only allegation is that defendant continued to use and failed to repair the irrigation pipe buried in an easement under plaintiff's property after being told that it was the source of cracks to plaintiff's driveway and after the defendant's insurer refused to pay for repairs to the irrigation pipeline. (*McDonell v American Trust Co* (1955) 130 Cal.App.2d 296, 298-299 [Failure to repair after notice of a problem is negligence].) Relief for a continuing nuisance is injunction, not punishment. (*Coppola v Smith* (E.D. Cal 2013) 982 Fed Supp 2d 1133, 1145.)

The complaint does not contain sufficient facts to support a claim for punitive damages. Unless plaintiff can make an offer of proof that defendants' actions amounted to malice, oppression and fraud, the motion to strike is granted without leave to amend. (*Ebaugh v Rabkin* (1972) 22 Cal.App.3d 891, 894 [there must be intent to vex, annoy or injure, not mere spite or ill will].)

There are no other tentative rulings. Consistent with California Rule of Court, rule 3.1308 (a)(2), no notice of intent to appear is required. If the non-prevailing party does not appear for hearing, the tentative ruling will become the order of the court. The prevailing party shall prepare an order for the court's signature.